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COMMON LAW PREEMPTION: ALASKA'S LIMITATION ON PRIVATE NUISANCE AND DUE PROCESS

Oji K. Nwankwo*

If this section is read as somehow shielding the permittee for every constituent of an emission or discharge by the mere mention of it in the permit, then we have big trouble.

John Stone¹

I. INTRODUCTION

During the past quarter century, legislatures and courts in the United States have used several methods to protect, preserve, and renew the environment. Among these are private common law actions as well as federal and state legislation, including both civil and criminal actions.² A complex body of contemporary environmental law evolved from common law actions aimed at protecting the environ-

* Articles Editor, 1995–1996, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Memorandum from John Stone, Alaska Department of Law, to Mike Menge (Mar. 9, 1994) (on file with B.C. ENVTL. AFF. L. REV.) [hereinafter Stone Memorandum].

² Concerned parties typically utilized common law property concepts such as nuisance, the public trust doctrine, trespass, negligence, and strict liability almost exclusively until the early 1960s. *See* FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION, THE LEGAL FRAMEWORK §§ 1.13–26 (1980). Because of the difficulty in obtaining injunctive relief, the expense of long trials spent determining close issues of fact, and the difficulty of proving a causal relationship between the defendant's actions and the plaintiff's harm, the 1970s saw a proliferation of citizen suits. DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 2.02 (1989); *see also* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–70(d) (1988 & Supp. V 1993); Federal Clean Air Act, 42 U.S.C. §§ 7401–7671 (1988 & Supp. V 1993); Clean Water Act, 33 U.S.C. §§ 1251–1387 (1988). *See generally* MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC., CIVIL AND CRIMINAL ENVIRONMENTAL ENFORCEMENT (92–09.03) (1991).

ment and individuals from harms created by burgeoning industry.³ As the public and legislators became increasingly concerned with environmental protection, a plethora of statutes and regulations—both state and federal—rapidly began to replace the common law as the primary tool of environmental protection.⁴ Statutes attempted to make up for inadequacies in the common law.⁵ Today, these statutes and regulations define the primary substantive environmental obligations of individuals and corporations in the American legal system.⁶ Common law causes of action, however, have remained as important mechanisms to safeguard against environmental harms not reached by statute.⁷

Government environmental regulation has been subjected to a host of constitutional attacks.⁸ Several groups unsuccessfully challenged state environmental legislation and regulations on the grounds that the state action exceeded the scope of the states' police power—the basis for many state environmental regulations.⁹ These challenges alleged violations of due process under the Fifth and Fourteenth Amendments to the United States Constitution.¹⁰ Despite the proliferation of environmental statutes and regulations, private nuisance actions have continued to serve as important environmental protections against highly individualized harms not addressed by broad state and federal governmental regulations.¹¹

³ See SELMI & MANASTER, *supra* note 2, § 2.02; SKILLERN, *supra* note 2, §§ 1.25-.26 (discussing how the inadequacy of many traditional causes of action and a growing public awareness led to greater public involvement through environmental legislation); see also ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 101 (1992) (stating that the common law serves as the primary underpinning for most statutes and regulations).

⁴ See Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985), noted in SELMI & MANASTER, *supra* note 2, § 2.02; PLATER ET AL., *supra* note 3, at 101; SKILLERN, *supra* note 2, §§ 1.25-.26.

⁵ SELMI & MANASTER, *supra* note 2, § 2.02.

⁶ See J. GORDON ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 3, 4 (12th ed. 1993).

⁷ See PLATER ET AL., *supra* note 3, at 257.

⁸ See ARBUCKLE, *supra* note 6, at 19-21, 31-35.

⁹ See *id.* at 19-20.

¹⁰ See *id.* at 31-35; PLATER ET AL., *supra* note 3, at 442-75 (discussing challenges to regulations as unconstitutional takings).

¹¹ See SELMI & MANASTER, *supra* note 2, § 2.02; Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 661 (1989).

In Alaska, the state has enacted legislation that severely restricts private nuisance actions.¹² Alaska passed the sweeping¹³ statutory

¹² Alaska Statute § 09.45.230 reads:

[a]ction based on private nuisance

(a) A person may bring a civil action to enjoin or abate a private nuisance. Damages may be awarded in the action.

(b) A person may not maintain an action under this section based upon an air emission or water or solid waste discharge, other than the placement of nuclear waste, where the emission or discharge was expressly authorized by and is not in violation of a term or condition of

(1) a statute or regulation;

(2) a license, permit, or order that is

(A) issued after public hearing by the state or federal government; and

(B) subject to

(i) continuing compliance monitoring;

(ii) periodic review by the issuing agency;

(iii) renewal on a periodic basis; or

(iv) AS 46.40; or

(3) a court order or judgment.

(c) The provisions of (b) of this section do not apply to actions in which the air emission or water or solid waste discharge that is the subject of the action produces a result that was unknown or not reasonably foreseeable at the time of the authorization.

(d) The provisions of (b) of this section remain in effect only as long as both of the following are satisfied:

(1) AS 46.03.900 defines "pollution" as including the contamination or altering of waters, land, or subsurface land of the state in a manner that creates a nuisance; and

(2) AS 46.14.990 defines "emission" as the release of one or more air contaminants to the atmosphere.

(e) Notwithstanding other provisions of law, except AS 09.50.170–09.50.240 and AS 19.25.080–19.25.180, a person may not bring a civil action to enjoin or abate a private nuisance or to recover damages for a private nuisance unless the action is authorized by this section.

(f) A person who is shielded under (b) of this section from a nuisance action shall indemnify, defend, and hold the state harmless from a claim or court action for inverse condemnation, including damages, costs, and attorney fees, for which the state may become liable because of the air emission or waste water or solid waste discharge for which the person is shielded by (b) of this section. The state shall immediately tender the defense of the inverse condemnation claim or court action to the person. The provisions of (b) of this section do not apply to shield the person, if the person fails to accept or refuses the tender of the defense. A person who prevails in the defense of the claim or court action for inverse condemnation described under this subsection shall be awarded full reasonable attorney fees and costs.

ALASKA STAT. § 09.45.230 (1994).

¹³ *Id.* It is unclear to what extent the statute leaves private property owners the ability to bring creative trespass or inverse condemnation suits to compel the state to pay for the impairment of the use of their property. *See* PLATER ET AL., *supra* note 3, at 16 (Teacher's Manual Update 1994). The law itself alludes to the possibility of inverse condemnation as a possible action against the state as a taking without compensation. *See* ALASKA STAT. § 09.45.230(f). However, as one timber industry spokesman noted, "[t]he theory of inverse

elimination of common law actions in 1993 in response to heavy lobbying by industry.¹⁴ Arguably, the statute wipes out a fundamental element of Alaska's common law: actions in private nuisance.¹⁵ This Comment examines the role of common law private nuisance actions in an environmental context and questions whether the Alaska statute, by eliminating these common law actions, violates equal protection. Section II discusses the traditional role of the common law and the importance of private nuisance in environmental protection. Section II also briefly explores the political dynamic surrounding diverse constituents and Alaska politics and examines a controversial private nuisance suit pending during the passage of Alaska Statute section 09.45.230. Finally, Section II discusses the function of federal and state environmental permits and the process of obtaining these permits. Section III examines the concept of equal protection and how Alaska courts apply this concept under Alaska's Constitution. Section IV analyzes Alaska Statute section 09.45.230 in light of equal protection doctrine under the Alaska Constitution. Section IV also considers whether the statute violates state equal protection rights by eliminating Alaska private property owners' traditional protection under common law tort. Section V concludes that the traditional right of access to the courts should be held "fundamental," triggering the highest judicial scrutiny under Alaska's equal protection analysis. Thus, without a compelling state interest, the Alaska statute is unconstitutional. Alternatively, if access to courts is not held to be a fundamental right, an Alaska court should scrutinize the Alaska statute closely because the significance of this right outweighs any governmental interest in limiting this right.

II. THE COMMON LAW, POLITICS, AND PERMITS

A. *Treading on the Common Law*

The precursors of American common law originated in ancient Rome, were eventually transformed and adopted in England, and from there

condemnation [has] not been 'bought' by the courts," and "such a case might be filed once, and then likely would not happen again." *Testimony on H.B. 282 Before the House Judicial Committee of Alaska*, No. 367 (Apr. 21, 1993) (statement of Jim Clark, Alaska Forest Association) (on file with B.C. ENVTL. AFF. L. REV.).

¹⁴ See PLATER ET AL., *supra* note 3, at 119 (Supp. 1994).

¹⁵ See *id.* at 301.

imported to the United States.¹⁶ The common law's purpose was to provide a stable and flexible framework to apply justice equitably.¹⁷ The common law was fluid and expanding as its unwritten principles originally were derived from local customs and usages that were recognized and affirmed by courts.¹⁸

Most statutes do not disturb the common law.¹⁹ In some cases, however, statutes can broaden or narrow the field of available common law remedies.²⁰ In these instances, statutes either independently change the existing common law remedies or authorize courts to do so.²¹ Specific legislation aimed at a precise set of circumstances can totally eliminate a common law doctrine addressing the same set of circumstances.²²

The extent to which common law remedies may be uprooted is, however, limited.²³ Certain individual constitutional protections—state and federal—check a state legislature's ability to enact laws.²⁴ These include the protection of substantive constitutional rights and the right to rational treatment.²⁵ Sweeping legislative eradication of common law actions such as the elimination of private nuisance mandated by the Alaska statute may violate certain constitutional limitations on Alaska lawmaking.²⁶

¹⁶ ARBUCKLE, *supra* note 6, at 6; *see* PLATER ET AL., *supra* note 3, at 365.

¹⁷ ARBUCKLE, *supra* note 6, at 6; SELMI & MANASTER, *supra* note 2, § 2.02.

¹⁸ JOHN MAKDISI, INTRODUCTION TO THE STUDY OF LAW 31 (1990); *see* ARBUCKLE, *supra* note 6, at 6.

¹⁹ PLATER ET AL., *supra* note 3, at 301.

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See* PAUL BREST & SANFORD LEVINSON, PROCESS OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 1186–88 (1992) (discussing constitutional protections of various forms); SELMI & MANASTER, *supra* note 2, §§ 5.01–.06 (discussing constitutional constraints on legislatures including substantive due process, equal protection, void for vagueness doctrine, procedural due process, nondelegation doctrine, compensation for takings, self-incrimination and confidentiality rights, and the right to a jury trial).

²⁴ *See* SELMI & MANASTER, *supra* note 2, §§ 5.01–.06.

²⁵ The right to procedural due process, the right not to be disfavored because of prejudice, the right not to be treated differentially with respect to constitutional rights and important interests, and the right not to be required to waive a constitutional right to receive a privilege or benefit also limit the scope of legislative power. *Id.* § 5.05.

²⁶ *See id.*

B. *Private Nuisance*

There are several state and federal statutes on which a private party might base an action against a polluter.²⁷ A common law nuisance action, however, is still an attractive remedy to which a party may turn for redress.²⁸ For several centuries, courts have recognized a nuisance cause of action.²⁹ "Nuisance" has been defined as, "that activity which arises from the unreasonable, unwarrantable or unlawful use by a person of his own property, working an obstruction or injury to the right of another or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume resulting damage."³⁰ Nuisance actions may take two forms—public and private.³¹

A public nuisance is "a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property."³² More generally, a public nuisance may be defined as "any unreasonable interference with rights common to all members of community in general and encompasses public health, safety, peace, morals or convenience."³³ A nuisance must affect a considerable number of people or an entire community or neighborhood to constitute a "public" nuisance.³⁴ Public nuisances generally are abated through actions by public authorities, but private citizens may have standing to sue in some instances.³⁵ As Alaska Statute section 09.45.230 is limited solely to private nuisances and does not eliminate public nuisance actions, the scope of this Comment is limited to private nuisances.³⁶

²⁷ See ARBUCKLE, *supra* note 6, at 3–18.

²⁸ See Rychlak, *supra* note 11, at 661.

²⁹ See *id.*

³⁰ BLACK'S LAW DICTIONARY 1065 (6th ed. 1990). The Second Restatement of Torts notes three different ways that courts have defined the term "nuisance": (1) as a human activity or a physical condition which harms or annoys others; (2) as the actual harm caused by the human conduct or physical condition; or (3) as both the conduct or the condition and the harm. RESTATEMENT (SECOND) OF TORTS § 821A, cmt.b (1977).

³¹ SELMI & MANASTER, *supra* note 2, § 3.01.

³² BLACK'S LAW DICTIONARY, *supra* note 30, at 1230.

³³ *Id.*

³⁴ See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705 (Ariz. 1972).

³⁵ See THOMAS J. SCHOENBAUM, ENVIRONMENTAL POLICY LAW, CASES, READINGS AND TEXT 35–36 (1985).

³⁶ See ALASKA STAT. § 09.45.230.

A "private" nuisance is one that affects rights of a private party as opposed to the general public.³⁷ The invasive conduct that occurs in nuisance cases usually takes place completely outside the effected property.³⁸ Specifically, private nuisance evolved from the common law action of assize of novel disseisin.³⁹ An individual's interest in real property, the "free tenement," gave certain rights to the holder of such an interest, the tenant.⁴⁰ In a free tenement, the tenant was to be protected from improper action under the feudal contract and through the action of assize.⁴¹ Thus, due process, upon which feudal justice was based, was intended to be ensured by the assize.⁴²

For today's environmental plaintiff, common law "private nuisance is the oldest and perhaps the most useful theory" upon which to base a claim.⁴³ Private common law nuisance, therefore, plays an important role in protecting the environment by providing plaintiffs, often disadvantaged relative to their opponents, both substantive and procedural advantages to statutory and regulatory suits.⁴⁴ Typically, the plaintiff in private nuisance actions is an individual or small group and

³⁷ See Rychlak, *supra* note 11, at 660.

³⁸ See *id.* at 657.

³⁹ See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 118-19 (1969) (discussing assize of novel disseisin). Assize courts are, "an ancient species of court, consisting of a certain number of men, usually twelve, who were summoned together to try a disputed cause, performing the functions of a jury, except that they gave a verdict from their own investigation and knowledge and not upon evidence adduced." BLACK'S LAW DICTIONARY, *supra* note 30, at 120. Assize of novel disseisin is defined as, "a writ of assize which lay for the recovery of lands or tenements, where the claimant had been lately disseised." *Id.* at 121. Assize of nuisance is, "a writ of assize which lay where a nuisance had been committed to the complainant's freehold; either for abatement of the nuisance or for damages." *Id.*

⁴⁰ See MILSOM, *supra* note 39, at 119.

⁴¹ *Id.*

⁴² Here, the term "due process" is not used in the modern sense but rather as a general allusion to feudal norms and traditions. See *id.*

⁴³ Rychlak, *supra* note 11, at 661. Nuisance liability can be predicated on intentional or substantially certain harm resulting from the plaintiff's conduct, negligence, or strict liability. SELMI & MANASTER, *supra* note 2, § 3.04. The issue in a nuisance action is whether the activity constitutes a "substantial and unreasonable interference" with the use or enjoyment of land. *Id.* Balancing lies at the heart of this determination. *Id.* Several factors bear on the gravity of the harm to the plaintiff, including the extent of the harm, the character of the harm, the social value which the law attaches to the type of use or enjoyment invaded, the suitability of the particular use or enjoyment invaded to the character of the locality, and the burden on the persons harmed or avoiding the harm. RESTATEMENT (SECOND) OF TORTS § 827 (1977). Courts may consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the locality, whether it is impractical to prevent or avoid the invasion if the activity is maintained, and whether it is impractical to maintain the activity if it is required to bear the cost of compensating for the invasion. *Id.* § 828 (1977).

⁴⁴ In addition, the ability to choose a favorable forum, either in state court based on state

the defendant is a corporation with a wealth of resources.⁴⁵ In contrast, many of the statutory and regulatory causes of action require detailed and expensive scientific experts and tests in order to be successful and thus are more difficult for individual or small groups of plaintiffs to bring.⁴⁶ Another drawback to statutory and regulatory causes of action is that notice requirements may delay a statutory proceeding.⁴⁷ Also, complex statutory schemes which may be unfamiliar to judges, counsel, and jurors may delay further the remedy sought.⁴⁸

A private nuisance action can be far more attractive to plaintiffs than an action based upon a statute or regulation as private nuisance actions tend to be less expensive.⁴⁹ In addition, a plaintiff need only plead that the pollution or activity "looks bad, smells bad, [or] does bad things" without delving into a scientific battle that a corporate defendant with deep pockets may be far better equipped to win.⁵⁰ In addition, private nuisance claims provide for both injunctive relief and damages, while many statutory actions only provide for injunctive relief.⁵¹

C. *The Permitting Process*

Defendants in nuisance suits in the past have tried to justify their conduct by claiming that they are operating within the parameters of a permit or regulation that encompasses the activity alleged to be a nuisance.⁵² State permits, however, often are set as state-wide "minimum standards" and are not meant to grant affirmative rights to pollute indefinitely at the prescribed levels.⁵³ Recognizing the problems of reliance on a standardized permitting process to address unreasonable interference with a plaintiff's land, courts consistently reject this permit defense.⁵⁴

common law action or federal court based on diversity or pendant jurisdiction may provide another advantage to the private nuisance plaintiff. *Id.*

⁴⁵ Rychlak, *supra* note 11, at 661.

⁴⁶ *Id.*

⁴⁷ *Id.* at 663.

⁴⁸ *Id.*

⁴⁹ *Cf. id.* at 661.

⁵⁰ Rychlak, *supra* note 11, at 661 (citing Langrock, *Class Action Litigation*, 25 TRIAL, Oct. 1989, at 47).

⁵¹ Rychlak, *supra* note 11, at 663.

⁵² *Id.* at 693-94; see also SELMI & MANASTER, *supra* note 2, § 3.06[2].

⁵³ See PLATER ET AL., *supra* note 3, at 16 (Teacher's Manual Update 1994); SELMI & MANASTER, *supra* note 2, § 8.02[3][a].

⁵⁴ PLATER ET AL., *supra* note 3, at 28 n.9; see SELMI & MANASTER, *supra* note 2, § 3.06[2];

State permits often are negotiated, and the resulting limits may be the product of political compromise rather than determinations of safe and reasonable limits on the permitted activity.⁵⁵ Moreover, even when a polluter is not in compliance with the limits of a permit, variances often are granted, potentially aggravating the integrity of the permitting process.⁵⁶

The impact on specific property holders rarely is included as criteria for defining whether an applicant should receive a permit.⁵⁷ For instance, "none of Alaska's current pollutant-specific emission standards were developed to protect the public from nuisances, nor was nuisance even considered in establishing the standards."⁵⁸ Alaska, "routinely authorizes fifteen tons of particulate matter emissions in a permit for ambient air quality protection" and "authorize[s] the dioxin emissions that may be present in the same exhaust stream and which the department *has not reviewed*."⁵⁹ In fact, Alaska never has issued a permit with conditions that provide protection to the public from nuisance.⁶⁰ Permits may be written so generally as to be ineffective in establishing safe activities and adequately notifying permittees of their obligations.⁶¹

Federal permits have latent problems that come to light when the arrow of private nuisance is removed from the property owners' quiver. Like state emissions or operations permits, federal permits sometimes are based on generalized minimum standards that undergo minimal scrutiny in speedy administrative permitting processes.⁶²

Rychlak, *supra* note 11, at 694 (citing *King v. Vicksburg Ry. & Light Co.*, 42 So. 204, 204 (Miss. 1906) and *Heinl v. Pecher*, 198 A. 797, 800 (Penn. 1938)).

⁵⁵ See SELMI & MANASTER, *supra* note 2, § 8.03[2][c] (discussing negotiation between the permit applicant and the permitting agency during the permit review stage and the pressure on permitting agencies to grant permits in response to threatened lawsuits by an unsatisfied applicant).

⁵⁶ See *id.* § 8.04[1] (discussing how variances, usually sought by facilities "facing chronic or unexpected difficulties in complying with environmental requirements," may be granted in some states when "compliance with requirements is inappropriate because of conditions beyond the control of [the party seeking the variance] . . . or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impracticable").

⁵⁷ See Stone Memorandum, *supra* note 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *C.f.* ARBUCKLE, *supra* note 6, at 17.

⁶² "[T]he public process has never addressed nuisance, or provided an avenue for an individual to get the department to establish standards to protect them from nuisance." Stone Memorandum, *supra* note 1; see also PLATER ET AL., *supra* note 3, at 16 (Teacher's Manual Update 1994).

In addition, the activities permitted under federal sanctions are not affirmative rights allowing an entity to pollute to such levels.⁶³ Many federal environmental statutes expressly preserve state common law actions.⁶⁴ For example, Justice Kennedy, writing for the United States Supreme Court in *Oulette v. International Paper Co.*, recognized that the savings clause in the Clean Water Act allowing for private state law suits manifested a congressional intent to preserve state causes of action with respect to water pollution.⁶⁵ Eliminating state-law remedies in place at the time federal legislation is enacted can destroy important protections that shore up a potentially questionable permitting process built into the federal regulatory scheme.⁶⁶ This type of state legislative action, therefore, may frustrate the intent of federal environmental legislation.⁶⁷

Professor Robert Glicksman has noted that federal environmental legislation is based on four values: legitimacy, accommodation, individual liberty, and efficiency.⁶⁸ Glicksman contends that these values are the foundation of Congress's intent in federal environmental legislation and they support a narrow category of pre-emption that preserves state common law actions.⁶⁹ Thus, without the tools of state common law individuals might be subjected to injuries never contemplated by legislators or agencies writing regulations and issuing permits, potentially denying injured parties access to any judicial forum.

⁶³ See PLATER ET AL., *supra* note 3, at 16 (Teacher's Manual Update 1994).

⁶⁴ The Resource Conservation and Recovery Act typifies savings clauses contained in federal environmental legislation: "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement . . . or to seek any other relief." 42 U.S.C. § 6972(f) (1988).

⁶⁵ *Oulette v. International Paper Co.*, 479 U.S. 481, 497-98 (1987).

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 131 (1985). "Legitimacy" is achieved first, by regulating through a politically accountable decisionmaker such as an elected official or a bureaucrat subject to various legislative oversight mechanisms; second, by allowing public participation in the regulating process; third, by having at least the perception of a well-informed decisionmaker; fourth, by the perception of a fair and even-handed regulatory approach; and fifth, by increasing predictability. *Id.* at 132-33. "Accommodation" is the process of reconciling conflicting interests, including conflicts between regulated industrial entities and those adversely affected by pollution. *Id.* at 134-35. "Individual liberty" reflects the desire for freedom from arbitrary government interference and maximum self-determination. *Id.* at 133-34. "Efficiency" is defined in economic terms as the allocation of resources that "maximizes the total value of production as measured by consumers." *Id.* at 135-37.

⁶⁹ See *id.* at 220-21.

D. *Politics, The Pulp Mill, and Alaska Statute Section 09.45.230*

Concerned citizens might be able to address these potential problems through political action; however, industry plays a prominent role in contemporary Alaska politics.⁷⁰ Alaska has a political economy that is characterized by conflicting pro-development and environmental interests.⁷¹ Juneau, Alaska's isolated capital, is home to its tiny legislature. The Alaska Senate is comprised of only twenty members, with only eleven members' votes needed to block unfavorable legislation.⁷² Therefore, the Alaska Senate has been the main political target of industry lobbyists. Today, one might assume that industry always has played an important role in Alaska politics; however, this was not always the case, especially in the years prior to Alaska's statehood.⁷³ Alaska's dependence on industrial tax revenue and campaign contributions, however, has allowed industry to become the prominent voice in Alaska politics.⁷⁴

This dynamic may have played some role in the final outcome of a private nuisance suit filed in 1992 against the Alaska Pulp Corporation (APC), which owned a pulp mill in Sitka, Alaska.⁷⁵ The plaintiffs

⁷⁰ See GERALD A. MCBETH & THOMAS A. MOREHOUSE, *ALASKA POLITICS AND GOVERNMENT* 51-74 (1994). In an effort to accommodate several different interests, from 1977 until 1990, Alaska politicians have spent \$26.7 billion on varying programs and projects. JOHN STROHMEYER, *EXTREME CONDITIONS: BIG OIL AND THE TRANSFORMATION OF ALASKA* 205-16 (1993). However, McBeth notes that spending in Alaska flows to a wide range of projects and has not consistently been given to "the kinds of projects that might be characterized as essential to industrial development." MCBETH, *supra*, at 67.

⁷¹ MCBETH, *supra* note 70, at 51.

⁷² STROHMEYER, *supra* note 70, at 205.

⁷³ Even after the first commercially productive oil well was struck in Alaska, industry reaped substantial profits from the collection and processing of Alaska's resources without paying taxes. STROHMEYER, *supra* note 70, at 207. After statehood in 1959, and after enabling legislation that ended taxing inequities in 1962, industry eventually was compelled to enter the political arena. *See id.*

The oil industry has considerable political power. MCBETH, *supra* note 70, at 69. For example, the Alaska legislature passed an incentive for continued oil production, the Economic Limit Factor (ELF), which was applied to two very profitable and productive oil fields with the expectation that the ELF would be modified as to those two fields. *Id.* at 69-70. The oil industry was able to block attempted changes in the ELF for two years after its application to the two already productive fields. *Id.*

⁷⁴ The oil industry fueled Alaska state revenues by more than 80% during the 1980s. MCBETH, *supra* note 70, at 68. The oil industry contributed \$422,000 to make it the largest single source of campaign funds for state legislative candidates in 1992. *Id.* at 70. Additionally, industry brings workers to the state, increasing its proportion of the populace and encouraging workers to become politically active. *See id.* at 212-13. It even has been said that some legislators look into the gallery for signals from lobbyists on how to vote. *Id.* at 206.

⁷⁵ Sitka residents, however, were not the only parties disturbed by APC's pollution. In 1993,

alleged APC recklessly released industrial waste into Sitka's Silver Bay and fumes containing sulfur dioxide and particulates into the air resulting in damage to the quality of life of waterfront property owners.⁷⁶ The named plaintiff, Larry Edwards, and a class of potentially 150 other owners of waterfront property,⁷⁷ sought damages as well as injunctive relief.⁷⁸ The injunction would require the mill to install an expensive water recycling system to curb its daily discharge of forty-million gallons of industrial waste into Sitka's Silver Bay.⁷⁹

Almost simultaneously, the Alaska legislature introduced Senate Bill 178, entitled An Act Relating to Civil Nuisance Actions—the precursor to Alaska Statute section 09.45.230.⁸⁰ The stated purpose of Alaska Statute section 09.45.230 is to prohibit parties, frustrated by their inability to block the issuance or renewal of permits, from abusing nuisance law to achieve their otherwise futile ends.⁸¹ However, in the House committee hearings on Senate Bill 178 which later became

the Environmental Protection Agency (EPA) threatened a lawsuit against APC because the Department of Environmental Conservation (DEC), the EPA's Alaska counterpart, failed to impose stiffer penalties on APC. Eben Punderson, *EPA: State Too Easy On APC Mill in SITKA*, SITKA DAILY SENTINEL, Apr. 20, 1993. DEC had filed APC's operating permit without incorporating a myriad of changes requested by the EPA during the public comment period associated with the consent decree. *Id.* The EPA warned DEC that failure: (1) to include higher fines based on the economic benefit received by APC's failure to install pollution control equipment; (2) to shorten the time within which APC would be required to install such equipment; and (3) to mandate improved methods for collecting air quality data in the consent decree would result in a lawsuit brought by the EPA against APC. *Id.*

⁷⁶ *Class Action Suit Filed Against APC*, SITKA DAILY SENTINEL, Mar. 2, 1992; Punderson, *supra* note 75.

⁷⁷ The other owners of potentially affected waterfront property along Silver Bay, including the City of Sitka, did not join the suit immediately. *Class Action Suit Filed Against APC*, SITKA DAILY SENTINEL, Mar. 2, 1992.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Sponsor Statement of Senate Bill 178 by Alaska Senator Robin L. Taylor, Senate Majority Leader* (Mar. 31, 1993) (on file with B.C. ENVTL. AFF. L. REV.).

⁸¹ The sponsor statement of Robin L. Taylor, Alaska Senate Majority Leader, states that the purpose of Senate Bill 178 is:

to clarify existing law and to protect permit holders from being sued for doing conducting [sic] those activities which are authorized by their permit. . . . Alaska needs to maintain its orderly society. Both state and local governments must be able to permit activities or hold permits for their own activities without the prospect of being sued by every person who simply opposes the permitted activity. . . . Senate Bill No. 178 amends Alaska's general nuisance statute to clarify the standard to be used by courts in determining whether or not an act or structure is in fact a nuisance. The goal is to prevent lawsuits against permit holders *when they are acting within the limits of their permits*. Senate Bill 178 would NOT protect any permit holder from a nuisance action if the permit holder exceeds or violates the limits of the permit.

Id. (emphasis in original).

Alaska Statute section 09.45.230, the Attorney General Designee emphasized that, "there are appropriate remedies and sanctions that the court may impose on those that abuse the process."⁸² In addition, he acknowledged that, "the underlying motive for [Alaska Statute section 09.45.230] is to make Alaska more 'user friendly' to the resource extraction industries."⁸³ Several individuals who testified before state legislators, however, questioned the bill's actual purpose as well as the Senate President's connection with APC.⁸⁴ Thus, Alaska Statute section 09.45.230 may be open to constitutional attack.

III. EQUAL PROTECTION

In all state constitutional cases, Alaska courts begin with the presumption that the challenged legislation is proper.⁸⁵ This presumption stems from the reasoning that it is not the judiciary's role to decide upon the wisdom of a statute and that the legislature is better equipped to balance competing social viewpoints.⁸⁶ Thus, plaintiffs claiming violations of Alaska's equal protection clause have a heavy burden.⁸⁷

The equal protection clause of the Alaska Constitution guarantees that, "all persons have a natural right to life, liberty, and the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law."⁸⁸ In Alaska, this "equal protection" clause of the state constitution has been interpreted as affording broader protections than its federal counterpart.⁸⁹ In addition, Alaska's courts have rejected the static federal two-tiered equal protection analysis and instead apply a single, sliding standard in all state equal protection cases.⁹⁰ In equal protection cases involving fundamental rights or suspect classifications, Alaska courts are bound to a "com-

⁸² *Testimony on S.B. 178 Before the House Finance Committee of Alaska* 1 (Mar. 9, 1994) (statement of Bruce Bothelho, Attorney General Designee, Alaska Department of Law) (on file with B.C. ENVTL. AFF. L. REV.).

⁸³ *Id.* at 2.

⁸⁴ *Testimony on H.B. 282 Before the House Judiciary Committee of Alaska* 1 (Apr. 21, 1993) (statement of Jeffery D. Trout) (on file with B.C. ENVTL. AFF. L. REV.); PLATER ET AL., *supra* note 3, at 16 (Teacher's Manual Update 1994).

⁸⁵ See *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1244 (Alaska 1992).

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ ALASKA CONST. art. I, § 1 (1994).

⁸⁹ See, e.g., *Burnor v. State*, 829 P.2d 837, 839 (Alaska Ct. App. 1992).

⁹⁰ See *State v. Erickson*, 574 P.2d 1, 11 (Alaska 1978) (discussing dissatisfaction with the federal two-tiered rational basis and compelling state interest tests).

pellent state interest standard" that mirrors the strict scrutiny test of the federal system.⁹¹

A. *Alaska's Sliding Equal Protection Scale and Fundamental Rights*

1. The Derivation of Fundamental Rights

"Rights" in American jurisprudence have been divided into broad categories—those that are or are not fundamental and those that are explicit or implicit. Alaska's equal protection clause protects individuals from several types of governmental action that frustrate the fundamental bases of the Alaska Constitution.⁹² These primary constitutional foundations are deemed "fundamental rights."⁹³ Cases concerning Alaska's equal protection doctrine sometimes involve the judicial articulation of these fundamental rights because the level of scrutiny changes in relation to the importance of the right affected.⁹⁴

In *State v. Rice*, the Alaska Supreme Court stated,

if we find such fundamental rights to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage . . . we need not stand by . . . waiting for constitutional direction from the highest court in the land.⁹⁵

For example, in *McCracken v. State*, plaintiff McCracken petitioned to represent himself in post-conviction relief proceedings.⁹⁶ In determining whether the unenumerated right to post-conviction relief was retained by Alaska citizens, the court examined the rights enjoyed by Alaska inhabitants prior to statehood and concluded, "we are of the opinion that a right so long established and of such fundamental importance must be held to have been so retained."⁹⁷ Traditional individual rights that are vital to society and paramount within the consti-

⁹¹ See *Erickson*, 574 P.2d at 11; see also *State v. Wylie*, 516 P.2d 142, 145 (Alaska 1975) (stating that when a fundamental right is abridged by a statute or regulation, the statute or regulation will be upheld only after a clear showing that the burden imposed is necessary to protect a compelling and substantial state interest).

⁹² See, e.g., *Bush v. Reid*, 516 P.2d 1215, 1221 (Alaska 1973).

⁹³ See *id.*

⁹⁴ See *Alaska v. Rice*, 626 P.2d 104, 112 (Alaska 1981).

⁹⁵ *Id.* (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970)).

⁹⁶ *McCracken v. State*, 518 P.2d 85, 87 (Alaska 1974).

⁹⁷ *Id.* at 91.

tutional structure of government are fundamental and protected under Alaska's Constitution.⁹⁸

The Alaska Constitution affirmatively grants to all persons the natural right to liberty.⁹⁹ Exactly what activities are protected by this liberty right, however, is unclear because the concept of liberty is broad, "illusive" and "incapable of definitive, comprehensive explanation."¹⁰⁰ The Alaska Constitution, however, provides that the rights retained by the people are not limited to those explicitly stated in the Alaska Constitution.¹⁰¹ Some fundamental rights derive from this liberty guarantee.¹⁰²

The Alaska Supreme Court in *Breese v. Smith* discussed an implicit fundamental right derived from this liberty guaranty.¹⁰³ In *Breese*, the Alaska Supreme Court held that under Alaska's constitutional liberty guarantee, although it is not expressly protected by the Alaska Constitution, individuals attending public schools possess an implicit fundamental right to wear their hair as they see fit.¹⁰⁴ The Alaska Supreme Court reasoned that the choice to wear one's hair long was protected by citizens' liberty right to control one's self free from governmental interference and traditionally has been protected by the common law and was intended by the framers of both the Alaska and United States Constitutions.¹⁰⁵

In both *McCracken v. State* and *Breese*, the court derived implicit fundamental rights from the Alaska Constitution using an interpretive method based upon tradition.¹⁰⁶ Fundamental rights rooted in tradition or implicit in the Alaska Constitution's liberty right, although not explicitly stated, can be derived using these approaches.¹⁰⁷

⁹⁸ See *Patrick v. Lynden Transp., Inc.*, 756 P.2d 1375, 1379 (Alaska 1988); *Freitag v. Gohr*, 651 P.2d 356, 357 (Alaska 1982) (Matthews J., dissenting).

⁹⁹ ALASKA CONST. art. I, § 1 (1980). Section 1 states: "Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, and the pursuit of happiness, and the enjoyment of the rewards of their own industry" *Id.*

¹⁰⁰ See *id.*

¹⁰¹ Section 21 of Article I of the Alaska Constitution states, "[t]he enumeration of rights in this constitution shall not impair or deny others retained by the people." ALASKA CONST. art. I, § 21 (1980).

¹⁰² See *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972).

¹⁰³ *Id.*

¹⁰⁴ *Id.* The court noted, however, that fundamental rights may be subject to certain government-imposed limitations to accommodate a competing state interest. See *id.* at 170.

¹⁰⁵ See *id.* at 169.

¹⁰⁶ See *McCracken v. State*, 518 P.2d 85, 87 (Alaska 1974); *Breese*, 501 P.2d at 168.

¹⁰⁷ See *McCracken*, 518 P.2d at 91; *Breese*, 501 P.2d at 168.

Thus, one might include access to the courts in the category of traditional pillars of American society and elevate it to fundamental status.¹⁰⁸

2. Triggering Heightened Scrutiny: The Compelling State Interest Standard

Upon the determination that a fundamental interest is encroached, Alaska courts must apply a compelling state interest standard.¹⁰⁹ This standard imposes a heavy burden on the state to prove that the statute or regulation in question is necessary to promote a substantial state interest.¹¹⁰ For example, in *Breese*, the Alaska Supreme Court held that the government had the burden of showing a compelling governmental interest because the state action encroached upon a fundamental right.¹¹¹ The court articulated this standard as a "substantial burden of justification" requiring the governmental body to show the furtherance of a substantial governmental interest.¹¹² The school board, the governmental body in *Breese*, failed to meet this burden by not proving "'hard facts' pertaining to the causal relationship between appearance and behavior."¹¹³ Thus, the compelling state interest standard shifts a substantial burden to the government under Alaska's sliding equal protection scale.¹¹⁴

3. Equal Protection Absent a Fundamental Right: The Uniform Balancing Test

Absent a fundamental right in equal protection cases, the legislative infringement on rights or the classifications created by a statute are balanced against the nature of the rights affected under the Alaska Constitution.¹¹⁵ Alaska courts in these cases apply a "uniform balancing" or "sliding" scrutiny test.¹¹⁶ The test is flexible depending on the importance of the right involved.¹¹⁷ In "sliding" scrutiny cases,

¹⁰⁸ See *Freitag v. Gohr*, 651 P.2d 356, 356 (Alaska 1982) (Matthews J., dissenting).

¹⁰⁹ See *Breese*, 501 P.2d at 171-72.

¹¹⁰ See *id.* at 172-74.

¹¹¹ *Id.* at 170.

¹¹² *Id.* at 171.

¹¹³ *Id.* at 172. Although this school regulation was promulgated by one school official, the court stated that had the regulation been passed through some democratic process, the individual liberty interest would not be diminished. See *id.* at 174.

¹¹⁴ See *Breese*, 501 P.2d at 174.

¹¹⁵ *Burnor v. State*, 829 P.2d 837, 839 (Alaska 1992); *State v. Rice*, 626 P.2d 104, 110 (Alaska 1981).

¹¹⁶ See *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1378 (Alaska 1988).

¹¹⁷ See *id.*

Alaska courts: (1) assign constitutional weight to the right affected; (2) examine the purposes served by the challenged statute; and (3) evaluate the state interest in the particular means employed by the state to achieve its objectives.¹¹⁸ The "sliding" scrutiny test imposes a higher burden on the state to show that the limitation of those rights or classifications bears a fair and substantial connection to a legitimate governmental interest in relation to the importance of the right affected.¹¹⁹

B. Access to Courts in Alaska

The interest in redressing wrongs via the judicial process is significant and a bar of that right strikes at the heart of several constitutional protections.¹²⁰ Justice Matthews joined by Chief Justice Rabinowitz of the Alaska Supreme Court, dissenting in *Freitag v. Gohr*, expounded the importance of access to the judicial system.¹²¹ They stated, "that effective access to the courts is an important right is beyond peradventure. In fact, 'it is clear that ready access to the courts is one of, perhaps the, fundamental constitutional right.'"¹²² The Justices elaborated, explaining that the judicial system is the primary institution for the assertion, protection, and enforcement of most other rights granted in our society.¹²³ Thus, in Justices Matthews's and Rabinowitz's view, because the right of access to the courts is "preservative of all rights" it should be deemed fundamental.¹²⁴

For example, denying a parolee access to civil court has been held to violate the equal protection clause of the Alaska Constitution.¹²⁵ In *Bush v. Reid*, the plaintiff, a felon on parole, filed suit to recover damages sustained in an automobile accident.¹²⁶ The trial court granted the defendant's motion to dismiss pursuant to Alaska Statute section

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).

¹²¹ *Freitag v. Gohr*, 651 P.2d 356, 356 (Alaska 1982)(Matthews, J., dissenting). In this case, Gohr filed suit to obtain payment under a contract and the Freitags appealed after a judgment for Gohr. When the Freitags' appeal was dismissed as untimely they petitioned to the Alaska Supreme Court to review whether the superior court had abused its discretion in dismissing the appeal. *Id.*

¹²² *Id.* at 357 (quoting *Cruz v. Hawk*, 475 F.2d 475, 476 (5th Cir. 1973)).

¹²³ *Id.*

¹²⁴ *Id.* But see *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988) (stating that under Alaska's sliding equal protection scale, although an important right, access to the courts is not a fundamental interest).

¹²⁵ *Bush v. Reid*, 516 P.2d 1215, 1220 (Alaska 1973).

¹²⁶ *Id.* at 1215.

11.05.070¹²⁷ which, when read in conjunction with Alaska Statute section 33.15.190,¹²⁸ suspends a felon's civil rights, including the ability to maintain an action for civil damages arising from an automobile accident while in the parole board's custody.¹²⁹

In *Bush*, the Alaska Supreme Court relied on the United States Supreme Court's holding in *Boddie v. Connecticut* to reverse the trial court.¹³⁰ In *Boddie*, the petitioner was barred from a divorce proceeding.¹³¹ The *Boddie* Court recognized "the centrality of the concept of due process in maintaining both order and justice in the resolution of disputes which inevitably arise from human interaction."¹³² The Alaska Supreme Court in *Bush*, explained the *Boddie* holding, stating: "[w]here the state commands a monopoly over the only available legitimate means of dispute settlement and the relationship underlying the dispute is warp and woof of the fabric of society, the state may not deny access to the forum of settlement on the account of poverty."¹³³

The *Bush* court noted, however, the "superficial distinctions" between *Boddie* and the case at bar, and concluded that, "the denial of access to civil courts rends the fabric of justice as surely here as in *Boddie*."¹³⁴ The court reasoned that the state has a monopoly over the

¹²⁷ Alaska Statute § 11.05.070 (repealed 1986) provided: "[a] judgment of imprisonment in the penitentiary for a term less than for life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of imprisonment." ALASKA STAT. § 11.05.070 (repealed 1986).

¹²⁸ Alaska Statute § 33.15.190 (repealed 1986) provided:

[t]he board may permit a parolee to return to his home if it is in the state, or to go elsewhere in the state, upon such terms and conditions, including personal reports from the paroled person as the board prescribes. The board may permit the parolee to go into another state upon terms and conditions as the board prescribes, and subject to the provisions of any compact executed under the authority of ch. 10 of this title and amendments to it. A prisoner released on parole remains in the legal custody of the board until the expiration of the maximum term or terms to which he was sentenced, less good time allowances provided by law. While in the custody of the board, a person is subject to the disabilities imposed by AS 11.05.070.

ALASKA STAT. § 33.15.190 (repealed 1986).

¹²⁹ *Bush v. Reid*, 516 P.2d 1215, 1215-16 (Alaska 1973).

¹³⁰ *Id.* at 1219. In *Boddie v. Connecticut*, the petitioner argued that imposition of a filing fee on an indigent party in a divorce proceeding violated due process rights under the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971).

¹³¹ See *Boddie*, 401 U.S. at 380-83.

¹³² *Bush*, 516 P.2d at 1218.

¹³³ *Id.* Additionally, the court, in a takings-like analysis, noted that a civil action such as *Bush*'s action for personal injuries is a form of property and the statutory scheme in Alaska totally diminished the value of the claim. *Id.* at 1218-19.

¹³⁴ *Id.* at 1218 (emphasis added).

"paramount process" of dispute resolution where private attempts to repair the breach of individual relationships has failed.¹³⁵

The Alaska Supreme Court, however, has held that access to the courts is not a fundamental right.¹³⁶ In *Keyes v. Humana Hospital, Inc.*, the petitioner challenged Alaska Statute section 09.55.536¹³⁷ which mandated pre-trial review of medical malpractice claims by an expert advisory panel whose written report is admissible at trial.¹³⁸ Among other complaints, Keyes argued that this process violated her rights under Alaska's equal protection clause.¹³⁹

The Supreme Court of Alaska held that access to the courts, although important, was not a fundamental right, therefore, the statute did not violate the petitioner's equal protection rights.¹⁴⁰ The court reasoned that the review panel provision did not impinge significantly on Keyes's access to the courts.¹⁴¹ The court's rationale also was based upon a number of decisions recognizing the legitimacy of solving "the malpractice insurance crisis" by increasing the availability and lowering the cost of medical malpractice insurance.¹⁴² The court upheld the statute because Keyes was not completely barred from bringing suit and because Keyes failed to make any showing that the medical review panels were unlikely to achieve their legitimate purpose of encouraging settlement without judicial proceedings.¹⁴³

D. Patrick v. Lynden Transport, Inc.

Although there are no Alaska cases directly on point, *Patrick v. Lynden Transport, Inc.* provides some useful insight into the applica-

¹³⁵ *Id.*

¹³⁶ *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

¹³⁷ Alaska Statute § 09.55.536 provides in relevant part:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel . . .

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it . . .

ALASKA STAT. § 09.55.536 (1994).

¹³⁸ See *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 345 (Alaska 1988).

¹³⁹ See *id.* at 357.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 358 (stating that the medical review panel requirement would delay a medical malpractice suit at most 80 days).

¹⁴² See *id.* at 357.

¹⁴³ See *Keyes*, 750 P.2d at 357.

tion of Alaska's equal protection doctrine.¹⁴⁴ Patrick, a resident of Idaho suing Lynden for allegedly breaching a lease, was required by Alaska statute 09.60.060.¹⁴⁵ to post a bond to cover Lynden's expected attorney's fees and litigation costs.¹⁴⁶ Patrick had lived in Alaska from 1981 to 1986 during which time he leased a truck to Lynden Transport,

¹⁴⁴ See *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988). *Texas Workers' Compensation Commission v. Garcia* is another case combining these principles which involves a statute restricting state common law action. See *Texas Workers' Compensation Comm'n v. Garcia*, 862 S.W.2d 61, 62 (Tex. App. 1993), *rev'd* 893 S.W.2d 504, 510 (Texas 1995). This suit was brought by Hector Garcia who challenged the new Workers' Compensation Act (Act) on several state constitutional grounds, including equal protection. *Id.* at 73. The plaintiff based his argument on the fact that as an employee of a company that continued to purchase workers' compensation coverage after the effective date of the new Act, Garcia would not be able to elect his common law rights and remedies. See *id.* at 68. The relevant portion of the Act deals with determination of benefits based on the American Medical Association Impairment Guides (Guides). See *id.* at 80–81. The Guides' impairment rating is used by the Act as "a percentage factor in computing the amount to be paid [under a workers' compensation claim], a method specifically disapproved of by the Guides." See *id.* at 81.

The Act does, however, provide for several opportunities to be heard. See *Garcia*, 893 S.W.2d at 514–15. Within the Act there is a three-stage hearing process. *Id.* An injured party first is granted a benefit review conference, second, a contested case hearing, and third, an administrative appeal. *Id.* A party that remains unsatisfied with the ultimate determination made through this administrative process, is allowed to appeal to the courts under a modified de novo review. *Id.* at 515.

Under Texas law, absent a finding of legislative impairment of a fundamental right, a statute violates the Texas equal protection clause only if it is not rationally related to legitimate state purposes. See *id.* at 524. Utilizing this low standard, the Texas Supreme Court upheld the Act. *Id.* at 510. The Texas Supreme Court compared the available remedies under the common law to those granted in the new Act and held that the new Act was an adequate and reasonable substitute. *Id.* at 523.

There are, however, key analytical differences between Alaska's and Texas's equal protection analyses. In Alaska, the amount of judicial scrutiny varies with the importance of the right affected. *Patrick*, 765 P.2d at 1377–78. This contrasts with the static two-tiered analysis used by Texas courts. Compare *id.* at 1378–79 with *Garcia*, 893 S.W.2d at 525. The Alaska test allows for varied judicial scrutiny depending on the primacy of the right involved whereas the Texas approach utilizes only the compelling state interest or rational basis standard. See *Patrick*, 765 P.2d at 1378–79.

¹⁴⁵ Alaska Statute § 09.60.060 provides:

Security for costs where plaintiff a nonresident or foreign corporation. When the plaintiff in an action resides out of the state or is a foreign corporation, security for the costs and attorney's fees, which may be awarded against the plaintiff, may be required by the defendant, if timely demand is made within 30 days after the defendant discovers that the plaintiff is a non resident. When required, all proceedings in the action shall be stayed until an undertaking executed by one or more sufficient sureties is filed with the court to the effect that they will pay the costs and attorney's fees which are awarded against the plaintiff, for not less than \$200. A new or an additional undertaking may be ordered by the court upon proof that the original undertaking is insufficient in amount or security.

ALASKA STAT. § 09.60.060 (1994).

¹⁴⁶ *Patrick*, 765 P.2d at 1375, 1376.

Inc.¹⁴⁷ Subsequently, Patrick moved to Idaho where he resided when he brought an action for breach of the lease. Patrick, as a nonresident, was required by statute to post a security bond for the litigation costs and attorney's fees that might be levied against him.¹⁴⁸ The proceedings were stayed until Patrick posted a five thousand dollar bond.¹⁴⁹ Patrick filed a petition for review to challenge the court order.¹⁵⁰ Patrick argued that the statute violated several state and federal constitutional provisions, including Alaska's equal protection clause.¹⁵¹

The Alaska Supreme Court began its analysis by noting that the statute does not completely bar nonresidents from litigating in an Alaska court.¹⁵² The effect of the statute, according to the court, was to discriminate between nonresidents who can afford to post a bond and those who cannot, as well as to discriminate between residents and nonresidents generally.¹⁵³ In determining the weight that should be awarded to Patrick's interest in access to the courts, the court first concluded that access to the courts was not a fundamental right under Alaska's Constitution.¹⁵⁴ Nonetheless, the Alaska Supreme Court stated that access to the courts is "important" and that "statutory infringement of that right is deserving of close scrutiny."¹⁵⁵

The *Patrick* court next examined the legislature's purpose in enacting the statute; "to provide security for costs and attorney's fees that may be awarded against a plaintiff, from whom it may be difficult to collect because of the plaintiff's nonresidence." The court accepted this legislative purpose as legitimate, but held that the means by which the legislature sought to promote that purpose were not sufficiently narrow given the importance of the right of access to the courts.¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1377.

¹⁵⁰ *Id.*

¹⁵¹ Patrick alleged violations of Article IV, § 15 of the Alaska Constitution which grants the Alaska Supreme Court rulemaking authority, violations of state and federal due process, violations of state and federal equal protection, and violation of the federal Privileges and Immunities Clause. *Patrick*, 765 P.2d at 1367-77.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1379.

¹⁵⁶ *Patrick*, 765 P.2d at 1379 (stating "we do not believe the legislature's chosen means to effectuate this purpose are sufficiently well-tailored to its ends where the important constitutional right of access to the courts is infringed"). Due to their disposition on the equal protection claim, the court chose not to decide the merits of Patrick's other constitutional claims. *Id.* at 1380 n.6.

The *Patrick* court reasoned that the statute was both overinclusive and underinclusive.¹⁵⁷ The statute was overinclusive because it required all nonresidents to post a security bond when it could not be assumed that all nonresidents would be uncooperative in paying awards of attorney's fees and litigation costs or would lack sufficient attachable assets.¹⁵⁸ On the other hand, the statute was underinclusive because it was based on the invalid presumption that only nonresident plaintiffs would be uncooperative in paying debts.¹⁵⁹ Alaska Statute section 09.60.060 also ignored the fact that "illiquid" resident plaintiffs might be more difficult to collect from than "liquid" nonresidents.¹⁶⁰ Moreover, Alaska's Civil Rules provided for, "partial compensation for attorney [sic] fees as a matter of course."¹⁶¹ The Alaska Supreme Court held that the statute was not sufficiently related to the purpose of providing security for attorney's fees and litigation costs to defendants, and therefore violated Patrick's equal protection rights.¹⁶²

IV. ANALYSIS OF ALASKA STATUTE SECTION 09.45.230

A. Judicial Access as a Fundamental Interest and a Compelling State Interest

Alaska Statute section 09.45.230 should be held to implicate an implicit fundamental right under the equal protection clause of the Alaska Constitution of a landowner burdened by a nuisance sanctioned by the statute.¹⁶³ Although access to a civil judicial proceeding is not an explicitly enumerated right, it may still be implicit in Alaska's traditions.¹⁶⁴ The right of a landowner burdened by a private nuisance to access the judicial system has great significance.¹⁶⁵ Although Alaska courts have found, in cases where there was not a complete bar to an

¹⁵⁷ *Id.* at 1379.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Patrick*, 765 P.2d at 1380. The court stated that Civil Rule 82 could result in substantial awards that were affirmed by the Alaska Supreme Court up to \$348,000. *Id.*

¹⁶² *Id.*

¹⁶³ See *Freitag v. Gohr*, 651 P.2d 356, 357 (Alaska 1982); *Bush v. Reid*, 516 P.2d 1215, 1218 (Alaska 1973).

¹⁶⁴ See *supra* notes 120-24 and accompanying text.

¹⁶⁵ If a parolee who has lost some measure of his civil rights has a fundamental right to bring a suit for damages resulting from an automobile accident, then arguably a property owner has a fundamental right to be heard in court and seek relief after her land is damaged. See *Bush*, 516 P.2d at 1218.

entire cause of action, that the right to access to courts was not fundamental, the right was still held to be significant.¹⁶⁶ Alaska courts should expand this ruling to protect the right of access to the courts as a fundamental constitutional right as Alaska courts have in several instances touted the importance of this right.¹⁶⁷ Two justices of the Alaska Supreme Court have stated that the right of access to the courts is perhaps the fundamental right because of its unique ability to enforce and preserve other rights.¹⁶⁸ Moreover, without access to a judicial forum, statutes infringing on other fundamental rights, like the right to wear one's hair how one chooses, never could have been challenged.¹⁶⁹

In House Finance Committee Testimony, Alaska's Attorney General Designee noted that, "it is a fundamental principle of law that a person has a right to reasonable use and enjoyment of his property and to the extent there is substantial interference with that right, the person is entitled to a remedy or some form of compensation."¹⁷⁰ The Attorney General Designee recognized that the Alaska statute, then a bill, "disallows a remedy to private property owners," and that, "this may raise a question of constitutionality."¹⁷¹

In addition, here, as in *Boddie v. Connecticut*, the state has a monopoly over the primary process by which nuisance disputes are resolved when private attempts at settlement have failed,¹⁷² and unlike *Keyes v. Humana Hospital Alaska, Inc.*, the bar on private nuisance actions is absolute.¹⁷³ Thus, deprivation of this liberty interest traditionally afforded citizens should constitute a denial of a fundamental right under Alaska's Constitution.¹⁷⁴

Therefore, in reviewing the statute under Alaska's equal protection standard, an Alaska court should require the state to prove a compelling state interest because a fundamental right has been implicated.¹⁷⁵

¹⁶⁶ See, e.g., *Patrick*, 765 P.2d at 1379; *Bush*, 516 P.2d at 1218.

¹⁶⁷ See *supra* notes 120-24 and accompanying text.

¹⁶⁸ See *id.*

¹⁶⁹ See *supra* notes 103-05 and accompanying text.

¹⁷⁰ Testimony on S.B. 178 Before the House Finance Committee of Alaska 1 (Mar. 9, 1994) (statement of Bruce Bothelho, Attorney General Designee, Alaska Department of Law) (on file with B.C. ENVTL. AFF. L. REV.).

¹⁷¹ *Id.*

¹⁷² See *supra* note 134 and accompanying text.

¹⁷³ See *supra* note 141 and accompanying text; *Bush v. Reid*, 516 P.2d 1215, 1218 (Alaska 1973).

¹⁷⁴ See *supra* notes 120-24 and accompanying text.

¹⁷⁵ See *State v. Rice*, 626 P.2d 104, 112 (Alaska 1981); *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974) (discussing the careful scrutiny taken to "ensure adequate protection of the interest

Under this standard the state would have a difficult, if not impossible, barrier to surmount.¹⁷⁶ Alaska's interest in weeding out meritless private nuisance suits is questionable at best.¹⁷⁷ There are only two reported private nuisance cases since statehood was granted to Alaska and passage of the statute apparently was aimed specifically at the suit against APC.¹⁷⁸

Even assuming a legitimate interest, the state cannot show that the statute is necessary to accomplish its objectives.¹⁷⁹ First, there are already procedural rules against bringing meritless suits of any kind which the state would have to prove were uniquely ineffective in weeding out frivolous private nuisance suits in relation to all tort claims.¹⁸⁰ Second, Alaska probably would be unable to show that the statute was the least intrusive measure that could be utilized to halt the filing of meritless claims.¹⁸¹ For example, the state could have provided for stiffer sanctions for meritless private nuisance claims.¹⁸²

In addition, if upheld, the Alaska statute would uphold the forsaken permit defense.¹⁸³ The statute assumes that permitted activities have been considered thoroughly and determined to be safe and generally reasonable to the surrounding community.¹⁸⁴ However, this is rarely the case. Under the compelling interest standard it would be unlikely that Alaska could prove a sufficient justification for the statute's encroachment of a fundamental right.¹⁸⁵

involved"); *Bush*, 516 P.2d at 1219; *BREST*, *supra* note 23, at 958-62; *SELMI & MANASTER*, *supra* note 2, § 5.05[1].

¹⁷⁶ See *Breese v. Smith*, 501 P.2d 159, 170-75 (Alaska 1972) (characterizing the evidence presented by the appellees as insufficient to sustain their burden).

¹⁷⁷ See *supra* notes 75-84, 156-62 and accompanying text.

¹⁷⁸ See generally *Gates v. City of Tenaki Springs*, 822 P.2d 455 (Alaska 1991); *Wood v. Alm*, 516 P.2d 137 (Alaska 1973). See also Naftali Bendavid, *Edwards, et al. v. Alaska Pulp Corp., et al.*, *LEGAL TIMES*, Oct. 24, 1994, at 16.

¹⁷⁹ See *Breese*, 501 P.2d at 172-75 (exemplifying the difficulty in proving a sufficient connection between the specific limitation on a fundamental right and the objectives sought by the statute or regulation).

¹⁸⁰ See *ALASKA R. CIV. P. 11*; see also *Breese*, 501 P.2d at 170 n.44.

¹⁸¹ See *Breese*, 501 P.2d at 171 n.52 (stating that the limitations on a fundamental right imposed by government regulation can be "no greater than is essential" to further the governmental interest justifying the limitation).

¹⁸² See *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379-80 (Alaska 1988).

¹⁸³ See *ALASKA STAT. § 09.45.230*; see also *supra* notes 53-54 and accompanying text.

¹⁸⁴ See *PLATER ET AL.*, *supra* note 3, at 119.

¹⁸⁵ See *supra* notes 108-13 and accompanying text.

C. *Alaska Statute Section 09.45.230 and Uniform Balancing*

Even if access to the courts is not a fundamental right, Alaska Statute section 09.45.230 should still be declared unconstitutional.¹⁸⁶ An Alaska court, under a uniform balancing test, should begin with the presumption that the statute is constitutional.¹⁸⁷ A court may, however, find that although it may not be a fundamental right, the right of access to the courts is important enough to warrant close scrutiny under *Keyes v. Humana Hospital Alaska, Inc.* and *Patrick v. Lynden Transport, Inc.*¹⁸⁸ Such a dramatic restriction on a landowner's ability to oppose regulatory action, which perhaps unexpectedly harms the landowner's property, broadly denies private property owners their important and traditional tort protections.¹⁸⁹

Even under this lower standard, the Alaska Legislature's means are not sufficiently narrow given: (1) the traditional importance of the right of access to the courts; (2) that there may be instances where access to the courts is barred completely; (3) the measures already in place to protect defendants against meritless suits; and (4) the less intrusive measures available.¹⁹⁰ The Alaska statute is similar to the one at issue in *Patrick v. Lynden Transport, Inc.* in that it is both overinclusive and underinclusive.¹⁹¹ The Alaska statute is overinclusive because it bars meritorious private nuisance actions as well as those without merit.¹⁹² The Alaska statute is underinclusive because it assumes that private nuisance plaintiffs are more likely to bring meritless claims than are other tort plaintiffs.¹⁹³ Thus, after examining the legislature's purposes in enacting the statute and the means by which the legislature sought to promote those purposes, an Alaska court should strike down Alaska Statute section 09.45.230.¹⁹⁴

¹⁸⁶ See *supra* section III.D.

¹⁸⁷ See *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1244 (Alaska 1992).

¹⁸⁸ See *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

¹⁸⁹ See *supra* notes 43-51 and accompanying text.

¹⁹⁰ Due to their disposition on the equal protection claim, the court chose not to decide the merits of Patrick's other constitutional claims. *Patrick*, 765 P.2d at 1380 n.6.

¹⁹¹ See *supra* note 157 and accompanying text.

¹⁹² See *supra* note 158 and accompanying text.

¹⁹³ See *supra* note 159 and accompanying text.

¹⁹⁴ See *id.*

V. CONCLUSION

The potential harm that might go unaddressed as a consequence of Alaska Statute section 09.45.230 seems to indicate that perhaps the electorate itself is the underrepresented group, as the powerful industrial lobby shapes environmental policy through a sweeping restriction of an historically powerful weapon against individualized harms. This runs contrary to our most basic ideas of republican government. It is this type of inequity, created by avaricious conglomerates that equal protection can in some instances ameliorate. By allowing one group to deny another a fundamental right, the court performs no checking function and indeed eviscerates the constitutional protections that exist to protect individuals who lack the political and financial clout to demand effective representation.

Courts that uphold legislation such as Alaska Statute section 09.45.230—the product of a defective political process—are no longer neutral forums for addressing citizens' grievances, but are, in reality, agents of the entrenched Alaska industrial lobby. Alaska courts should step forward when legislation affects such a significant right and apply heightened scrutiny, rather than support the products of a defective political process under the guise of objectively deferring to the legislature.